IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15/07/2004

CORAM

THE HONOURABLE MRS. JUSTICE R.BANUMATHI

CRL.APPEAL No.716 of 1997

Jambulingam ... Appellant /
Accused

-Vs-

State by
Inspector of Police,
P.2, Otteri Police Station, ... Respondent /
Madras. Complainant.

Criminal Appeal against the Judgment dated 18.09.1997 made in
S.C. No.149 of 1996 on the file of XIII Assistant Sessions Judge, Madras.

!For Appellants : Mr. T.Munirathina Naidu

^For Respondent : Mr. A.N.Thambidurai,
Govt.Advocate (Crl.Side)

:J U D G M E N T

Appellant is the accused in S.C.No.146 of 1996. By the
Judgment dated 18.09.1997, the XIII Assistant Sessions Judge, Madras has
convicted the Appellant / Accused under S.376 I.P.C. for committing Rape on
the victim girl and sentenced him to suffer Rigorous Imprisonment for seven
years.

2. Case of prosecution could briefly be stated thus:- P.W.1 -
Anitha is the daughter of P.W.2 - Nirmala. On 28.05.1994 - 8.30 a.m., P.W.1
went to play near her Paternal Uncle's house along with P.W.3 - Praveen Kumar,
which is situated in the same Street. The accused is residing in Door No.10,
II Street, Ekanthipuram. The accused enticed P.W.1 - Anitha to come to the
Upstairs by showing her Chocolate. Believing his words, P.W.1 went to
Upstairs. P.W.1 was made to lie on M.O.2 - Mat. The accused removed his
clothes and lied down on P.W.1 and penetrated his male organ into the private
part of P.W.1. Within short time, P.W.2 - Nirmala, mother of P.W.1 went to
the Upstairs and found the accused lying on P.W.1. When P.W.2 questioned the
conduct of the accused, the accused pushed down P.W.2 and tied his Lungi (
M.O.3) and ran away. P.W.1 narrated the occurrence to her mother P.W.2.
Husband of P.W.2 was not available in the house. He came back only in the

evening. After his return, P.W.2 informed him about the occurrence. Thereafter, they proceeded to lodge the Complaint.

3. Registration of case and Investigation. On 28.05.1994 - 7.00 p.m., P.W.2 Nirmala gave Ex.P.1 - Complaint to P.W.10 - Inspector of Police, Otteri. P.W.10 - I.O. examined P.W.1 - Anitha. On the basis of Ex.P.1 Complaint, the case was registered in Crime No.782 of 1994 for the offence under S.376 I.P.C. under Ex.P.11 - First Information Report.

4. P.W.10 - I.O. had taken up the investigation. He has prepared Ex.P.4 - Observation Mahazar and Ex.P.12 - Rough Plan on the scene of occurrence - house of the accused. P.W.1 was referred to the Hospital for Medical Examination.

5. P.W.4 - Dr.Madavi has examined P.W.1 and noted that "there was a tear about 10 cm in the front vig-wall near the introtius and hymen was congested and red near the left labium minora. No other injury was noted. There was no Vaginal discharge ". P.W.4 issued Ex.P.2 - Accident Register.

6. The accused was arrested on 29.05.1994. M.O.3 - Lungi was seized from him. He was also sent for Medical Examination for ascertaining his age. P.W.8 - Dr.Murugesan examined the accused. He has conducted Radiological Examination for the accused and gave the opinion that the accused is aged 15-18 years. Potency Test for the accused was also conducted. P.W.8 further opined that " the accused is capable of erection of Penis " and that " there is nothing to suggest that he is impotent ".

7. Seized Material Objects were sent for Chemical Analysis. Human Blood was detected in M.O.1 - Frock of P.W.1 and M.O.3 - Lungi of the accused. On completion of the investigation, the accused was charge sheeted for the offence punishable under S.376 I.P.C.

8. To substantiate the charge against the accused, in the trial Court, P.Ws.1 to 10 were examined. Exs.P.1 to P.15 were marked; M.Os.1 to 3 were produced. The accused was questioned under S.313 Crl.P.C. about the incriminating evidence and circumstances. Denying the same, the accused stated that a false case is foisted against him due to the enmity between his family and the family of P.W.1 on enjoyment of site.

9. Upon consideration of the evidence, the trial Court rejected the defence version. On the evidence of victim girl - P.W.1, the trial Court found that P.W.1 was Sexually Molested and Raped by the accused. For finding the accused guilty, the trial Court mainly relied upon the evidence of P.Ws.1 and 2, which is corroborated by the Medical evidence. Holding that the prosecution has established the guilt of the accused beyond reasonable doubt, the trial Court convicted the accused under S.376 I.P.C. sentencing him as aforesaid in Para (1).

10. Assailing the findings and the conviction of the trial

Court, Mr.T.Munirathina Naidu, learned counsel for the Appellant / Accused submitted that the trial Court has not properly appreciated the evidence in the light of previous enmity between the families. Contending that the occurrence is highly improbable, the learned counsel submitted that the trial Court has not taken into consideration the nondetection of Semen in M.O.3 - Lungi, which is fatal to the prosecution case. Pointing out the improbabilities, the learned counsel has submitted that the trial Court erred in basing the conviction on the interested Witnesses, viz. P.Ws.2 and 3 and the tutored version of P.W.1 and the conviction is unsustainable.

11. Countering the arguments, Mr.A.N.Thambidurai, learned Government Advocate (Crl. Side) has drawn the attention of the Court to the evidence of P.Ws.1 and 2 and submitted that in view of tear in the private parts of P.W.1, the trial Court has rightly found that the evidence of P.W.1 is strengthened by the Medical Evidence and that evidence is unimpeachable in character. Submitting that the family of P.W.1 would not have come forward with false accusation against the accused, the learned Government Advocate contended that the defence plea of false case was rightly rejected by the trial Court and that there is no reason warranting interference.

12. Upon careful appreciation of the evidence and materials on record, Judgment of the trial Court and submissions of both sides, the following points arise for consideration in this appeal:-

(i) Whether the prosecution has proved that P.W.1 - Anitha was Sexually Molested and Raped by the Appellant / Accused ? (ii) Whether the conviction of the Appellant / Accused under S.376 I.P.C. warrants any interference ?

13. Scene of occurrence is the house of the accused at Door No.10, II Street, Ekanthipuram, Otteri. The house belongs to the accused and the family of the accused is residing in the Upstairs. On 28.05.1995 - 8.30 a.m., P.W.1 - Anitha was playing with her Uncle's Son - P.W.3 (Praveen Kumar). At that time, the accused called the victim girl showing some Chocolates. The accused had taken the victim girl to the Upstairs. The conduct of the accused in taking P.W.1 to the Upstairs is well spoken by P.Ws.1 and 3. Though they are Young Witnesses, there is nothing to doubt their version.

14. In her evidence, P.W.1 has clearly narrated the occurrence and has stated as to how the accused had taken her showing Chocolate and also telling her that he would get Parrot for her. After taking P.W.1 to the Upstairs, the accused has made her to lie down on M.O.2 - Mat and has penetrated his Penis in the Vagina of P.W.1. When P.W.2 - Mother of P.W.1 saw the accused lying naked on P.W.1 and when she questioned the conduct of the accused, the accused had run away. Evidence of P.W.1 - Victim girl clearly brings out the Sexual Molestation and the act of Rape committed on her by the accused. Her evidence is corroborated by the evidence of her mother P.W.2 - Nirmala, who came and saw the accused lying on her daughter P.W.1.

15. The main contention urged by the accused is that P.W.2 - Nirmala is an Interested Witness and that a false case is foisted against the accused. For appreciation of this defence, let us firstly assess the trustworthiness of the young girl P.W.1. She has clearly stated as to how she had been subjected to Sexual Intercourse. In cases of Rape, particularly on young girls, Medical evidence lends valuable and vital assistance. The accused was also subjected to Medical Examination. On Radiological Examination, he was found to be "Aged about 15 years and below 18 years " (Ex.P.9 - Age Certificate). The accused was found to be " Able to get erection of Penis ". P.W.8 - Dr. Murugesan has clearly opined that " there is nothing to suggest that he is impotent ". Thus the accused is found to have been capable of Sexual Intercourse is a strong piece of evidence supporting the prosecution case.

16. Victim girl - P.W.1 was examined by P.W.4 - Dr.Madavi. On examination, P.W.4 noted " a tear about 10 cm in the front vig-wall near the introtius and hymen was congested and red near the left labium minora ". Injuries on the private parts of P.W.1 and tear in her Vagina is the evidence of unimpeachable character clearly establishing that she was Raped. Thus Medical Evidence lends assurance to the credibility of P.W.1 and to the prosecution case.

17. At the time of occurrence, P.W.1 - Anitha was wearing M.O.1 - Frock. During Chemical Analysis, her blood was detected in M.O.1 - Frock. Detection of Human Blood is yet another evidence of formidable character lending assurance to the prosecution case. Likewise, during Chemical Examination, Human Blood was detected in the Lungi (M.O.3) of the accused, which the accused is not able to explain. Semen was not detected in M.O.3 - Lungi. Laying emphasis upon non-detection of Semen in M.O.3 - Lungi, the case of prosecution is assailed on the ground that the absence of Semen in M.O.3 - Lungi is fatal to the prosecution case. As noted earlier, the accused aged 18 years was found to be able to get erection of Penis. The accused had only pressed his male organ into the Vagina of P.W.1. The accused may or may not have emitted Semen. Therefore, the absence of Semen in the Lungi no way discredits the evidence of P.W.1. Like wise the absence of injuries on the person of P.W.1 is no way advantageous to the accused. No external mark of violence and bleeding was noted in the Vagina of P. W.1. P.W.1 being aged ten years and the accused being aged 18 years, it would have been easy for him to overcome P.W.1. Hence, the absence of external mark of violence on the private parts of P.W.1 is no way advantageous to the accused.

18. Feeble attempt is made by the accused in trying to explain the tear in the Hymen of P.W.1 that it would have been caused due to fall from the tree. An attempt was made to put forth this defence by examining D.W.2 - Magimai Mary, the resident of the area - Ekanthipuram. In her evidence, P.W.2 has stated that on 28.05.1994 at about 1.00 p.m., she heard that P.W.1 - Anitha had fallen from the tree and that she was taken to Hospital. This defence set forth is clearly an after thought. During Cross-examination, it was not suggested to P.Ws.1 and 2. The possibility of tear in the Vagina being caused due to fall from tree was also not suggested from P.W.4 - Dr.Madavi. Likewise during the questioning under S.313 Crl.P.C.

the accused had not stated that P.W.1 - Anitha had fallen from tree. In such circumstances, no weight could be attached to the above after thought defence plea set forth by the accused.

19. Next limb of defence by the accused is that due to land dispute between the families of P.W.1 and the accused, a false case is foisted against the accused. Apart from P.W.1, P.W.2 - Nirmala has two other girls. The family would naturally have concern for the future of P.W.1 - victim girl and also two other young girls. It is quite unbelievable that without having any concern for their future, P.W.2 would have made false accusation on the ground of trivial dispute over enjoyment of a site. This limb of defence was rightly rejected by the trial Court.

20. The occurrence was on 28.05.1994 - 8.30 a.m. Ex.P.1 - Complaint was lodged before Otteri Police Station at 7.00 p.m. Prosecution case is assailed on the ground of delay in registration of the case. Mere delay in filing First Information Report is no ground to doubt the case of the prosecution and that the evidence given by the Prosecutrix should not be brushed aside. Since the victim girl was aged ten years, the family might have thought over the matter whether to lodge the Complaint or not. Their reluctance in going to the Police Station and the delay in lodging the Complaint are quite reasonable and acceptable. Upon careful re-assessment of the evidence, this Court finds that P.W.1 has clearly narrated the occurrence. Her evidence is amply corroborated by Medical Evidence and the evidence of her mother - P.W.2.

21. Upon careful assessment of the evidence, the trial Court has rightly found that the prosecution has established the charge of Rape against the accused. Under S.376(2), in a case where Rape is committed on a child below twelve years of age, the normal sentence is not less than ten years' R.I. though its proviso says that in exceptional cases "for special and adequate reasons" sentence of less than ten years' R.I. can also be awarded. However, recourse to proviso can be had only "for Special and Adequate reasons " and not in a casual manner. The learned Assistant Sessions Judge has not indicated any special and adequate reasons for imposing lesser sentence. Since there is no appeal against the adequacy of sentence, the matter is to be left at that. Considering the age of the victim girl and the trauma which she suffered, sentence of Rigorous Imprisonment of seven years imposed on the Appellant / Accused is reasonable and the same is to be maintained. The finding of guilt, conviction and sentence of imprisonment are confirmed. This appeal has no merits and is bound to fail.

22. Therefore, the Judgment of the XIII Assistant Sessions Judge, Chennai in S.C.No.149 of 1996 (Dated 18.09.1997) convicting the Appellant / Accused under S.376 I.P.C. and sentence of Rigorous Imprisonment of seven years are confirmed and this appeal is dismissed.

23. The trial Court is directed to take immediate steps for securing the Appellant / Accused to commit him to prison for serving the remaining period of sentence. The trial Court is also directed to comply with the above direction within three months and the compliance of the above

direction may be intimated to this Court at once within the time stipulated.

Index:Yes

Internet:Yes

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To
1. The III Asst. Sessions Judge, Chennai.

2. The III Asst. Sessions Judge, Chennai. Through
The Principal Sessions Judge, Chennai.

3. The Superintendent, Central Prison, Chennai.

4. The Inspector of Police, P.2 Otteri Police Station, Chennai.

5. The Public Prosecutor, High Court, Madras.

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